No. 06-139

In the Supreme Court of the United States

SAFWAT H. SHAKIR,
Petitioner,

v.

PRAIRIE VIEW A&M UNIVERSITY, TEXAS A&M UNIVERSITY SYSTEM, AND THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because the court of appeals's non-precedential decision does not resolve any important question of federal law in a way that conflicts with relevant decisions from the Court or other courts of appeals.

Shakir urges the Court to grant review to resolve a purportedly "stark" conflict among the courts of appeals regarding the standard for evaluating comparative qualifications as evidence of pretext in Title VII cases. But Shakir mischaracterizes the circuits' standards and, as a result, inaccurately describes the nature and extent of the variation among those jurisdictions. In fact, the circuits have reached a near-consensus on the standard for evaluating pretext evidence, and any differences articulated by those circuits in the minority exist more in degree than in kind. Moreover, this case would be a poor vehicle for addressing such differences because Shakir—who was ranked nineteenth among twenty-six candidates for the position in question—has not shown that he could survive the summary-judgment stage under *any* standard.

Shakir also erroneously claims that the court of appeals's opinion presents important conflicts with three of the Court's decisions: *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006); and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *Reeves* is inapposite because its holding addresses a different aspect of a Title VII plaintiff's proof than the court of appeals's standard for evaluating comparative qualifications as pretext evidence. Although *Ash* disapproved a metaphor referenced by the court of appeals in describing this standard, that reference in a non-precedential opinion was surely harmless error because Shakir's pretext proof would fail in any event. Finally, the court of appeals cited and correctly applied *Desert Palace*'s standard for mixed-motive discrimination cases notwithstanding language in a footnote that Shakir misconstrues. The Court should deny the petition.

STATEMENT

1. Prairie View A&M University, a member of the Texas A&M University System, is a public institution of higher education located in Waller County, Texas. TEX. EDUC. CODE §§87.101-.102. The University's College of Agriculture and Human Science includes a research department known as the Cooperative Agriculture Research Center ("CARC"). Pet. App. 12a. CARC's mission is to conduct "[r]esearch activities in the basic, applied and social sciences to produce information and technological developments which improve the social and economic conditions of targeted clientele in Texas, the nation, and the world." Prairie View A&M University, College of Agriculture and Human Sciences, Mission Statement, http://www.pvamu.edu/pages/304.asp (last visited Oct. 31, 2006).

In February 2001, CARC posted an announcement for a new, full-time, permanent research position titled "Research Scientist (Agronomist)." Pet. App. 2a. The announcement called for candidates with a "Ph.D. in Agronomy, Soil Science, Plant Science, or closely related discipline [and a] proven track record of conducting greenhouse and field research, and in managing resources." *Id.* Dr. Alfred Parks, CARC's Director, confirmed that CARC specifically sought a candidate with *field*-research experience—*i.e.*, "growing it outside in the field not in the lab." R.123; *see also* Pet. App. 2a. Such experience was integral to the position: the job announcement explained that the Agronomist would primarily be responsible for "conducting research on soil and natural resources, with emphasis on soil and water management, field crops, forages, and pasture management." Pet. App. 12a.

The job announcement stated that the position would "remain open until filled." R.331; *see also* Pet. App. 2a, 6a, 21a. Parks and Dr. Richard Griffin, the selection committee chair, confirmed the open application period. R.563, 566; Pet. App. 21a. Nothing in the

job posting or announcement indicated an application deadline. Pet. App. 6a, 21a.[1]

Petitioner Safwat H. Shakir, a white Egyptian national, applied for the Agronomist position in March 2001. *Id.*, at 2a, 12a. Shakir, who has a Ph.D. in Soil Ecology-Terrestrial Community Ecology, has authored multiple articles and one book on agricultural subjects, has accumulated fifteen years of laboratory experience, and has conducted field research for the Egyptian government. Pet. App. 2a. Since 1989, Shakir has worked as an Instructor in the University's Department of Computer Science. *Id.*

Dr. Nathaniel Keys, an African-American, applied for the Agronomist position in June 2001. *Id.*, at 12a. Keys, who has a Ph.D. in Horticulture/Entomology, had experience working with farmers, participating in projects funded by outside grants, and, for approximately five years, conducting laboratory research. *Id.*, at 3a. When he applied, Keys was the University's Program Leader in Agriculture and Natural Resources and the Project Director of the Small Farmer Outreach Training and Technical Assistance Project. *Id.*

Besides Shakir and Keys, twenty-four other candidates applied for the Agronomist position. *See id.*, at 12a-13a. The selection committee scored the applicants in four categories: (1) research; (2) education; (3) experience; and (4) knowledge, skills, and ability. *Id.*, at 2a-3a, 12a. This system also weighted the scores to emphasize certain qualifications, such as the field-research aspect

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1. For these reasons, Petitioner's assertions that CARC "belated[ly]" considered candidates "[a]fter the application period . . . closed" are incorrect. Pet. 3, 4. Petitioner's reliance on the testimony of Albert Gee, the University's Director of Human Resources, is misplaced because Gee testified that he did not have personal knowledge of the application period. *Compare* Pet. 25 n.13 *with* R.552-53.

of the position. R.82. The committee then ranked the applicants according to their scores. Pet. App. 3a. The committee had already evaluated and ranked Shakir and the other twenty-four candidates at the time Keys applied. *Id.*, at 12a.

Griffin sent Parks a memorandum ranking the seven top candidates according to their scores. *Id.*, at 3a, 12a. Keys ranked fourth. *Id.*, at 3a, 13a. Shakir was not on the list because his score ranked nineteenth among the twenty-six candidates. *Id.* Parks testified that, because the top three candidates could not be reached or were no longer interested, the University offered the position to Keys, who accepted it. *Id.*; R.329.

The University's Human Resources Department notified Shakir that he was not selected for the Agronomist position. Pet. App. 3a, 13a. This notice explained that, although Shakir met the position's qualifications, the University had "decided to offer the position to an applicant with the qualifications that best meets [CARC's] needs." *Id.*, at 13a.

Shakir filed an internal complaint with the University contesting the decision. *Id.*, at 3a, 13a. He objected to the selection committee's determination that he was not as qualified for the position as Keys and requested a comparison of his and Keys's credentials, the committee's selection criteria, his ranking, and the identity and qualifications of the committee's members. *Id.*, at 13a.

In response to Shakir's complaint, the College of Agriculture and Human Sciences issued a report that provided the information that Shakir had requested. *Id.*; R.62-67. The report further explained that "Dr. Keys was selected based on the perception by the Committee . . . that he would engage in basic research related directly to the instruction program and work effectively with students." Pet. App. 13a-14a. The report also noted that "Dr. Keys has previously taught for the Agriculture Program and has extensive experience within [the University's] extension system," and, thus,

was in a position "to foster cooperative and collaborative interactions among research, teaching and outreach activities within the College." *Id.*, at 14a.

Shakir appealed this resolution of his complaint, characterizing the report as "not convincing and unacceptable." *Id.* The University created a five-member faculty committee to investigate Shakir's appeal. *Id.* This investigative committee determined that the search-committee members were fully qualified to screen applicants for the Agonomist position. *Id.* It also concluded that the scoring system "was applied fairly to Dr. Shakir," R.410, and that Shakir had not been ranked among the top seven candidates in part because his "background was based on laboratory experiences" rather than the field-research experience that CARC desired, Pet. App. 15a. Finally, it found that Keys's score reflected only one completed evaluation form, filled out by Griffin, and that it was unclear whether other search-committee members had evaluated Keys. *Id.*

Shakir complained to the University's Provost that the faculty committee's conclusions were vague and non-explanatory. *Id.* He challenged the committee's reliance on the distinction between laboratory and field research and the fairness of Keys's selection based on one written evaluation. *Id.* Shakir asked for a copy of Keys's résumé and the search committee's meeting minutes. *Id.* He also requested that his employment status be changed from Instructor to Tenured Faculty. *Id.*

2. After the University denied his requested change in employment status, Shakir filed this action against the University, the Texas A&M University System, and the State of Texas (collectively, "the University"). *Id.*, at 2a. Shakir alleged that the University had discriminated against him on the basis of his race and national origin by failing to select him for the Agronomist position, by paying him less than similarly situated faculty

members, and by failing to award him tenure, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and the Texas Commission on Human Rights Act, TEX. LAB. CODE §21.252, *et seq.* The University filed a motion for summary judgment on these claims, Pet. App. 3a, 16a, which the district court granted, *id.*, at 33a.

With respect to Shakir's claim based on the University's selection of Keys instead of him for the Agronomist position, the district court concluded that Shakir had established a prima facie case of discrimination and that the University had proffered a legitimate, non-discriminatory reason for its actions: Keys more closely conformed to the position's requirements. *Id.*, at 19a-20a. Thus, the dispositive question was whether Shakir had presented competent summary-judgment evidence that created a genuine issue of material fact as to whether the University's reason was merely a pretext for discrimination. *Id.*, at 20a. The court concluded that Shakir had not met this burden because his arguments were either not supported by the record or immaterial. *See id.*, at 21a-28a. In particular, the court determined that "[t]here are simply no glaring differences between the qualifications of the two men," and thus was "unable to conclude that [Shakir's] qualifications were superior to those of Dr. Keys, much less clearly superior." *Id.*, at 27a. Instead, the court viewed Shakir's pretext argument as grounded solely in "his subjective opinion that he was more qualified for the position." *Id.*

The court rejected Shakir's disparate-pay claim on the ground that he was impermissibly comparing his salary as a non-tenured Instructor to tenured Associate Professors—*i.e.*, to persons who were not "similarly situated." *Id.*, at 28a-29a. The court also held that Shakir's complaint for failure to award tenure could not proceed because he failed to exhaust his administrative remedies. *Id.*, at 32a. Finally, the court held that Shakir's state-law claims

were barred by the Eleventh Amendment. *Id.* Shakir appealed. *Id.*, at 2a.

3. In an unpublished, non-precedential decision, the court of appeals affirmed. *Id.*, at 2a, 9a.[2] Like the district court, the court of appeals held that Shakir's pretext arguments were all either not supported by the record or immaterial. *Id.*, at 5a-7a. The court specifically held that Shakir had failed to meet the Fifth Circuit's standard for rebutting an employer's qualification-based reason for an employment decision: that he was "clearly better qualified" than Keys. *Id.*, at 7a-8a. In this regard, the court noted that "unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of individuals charged with the evaluation duty." *Id.*, at 7a (quoting *Odom v. Frank*, 3 F.3d 839, 847 (CA5 1993)).

The court of appeals further held that Shakir could not invoke the "mixed motive" analysis for Title VII claims propounded by the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because he had failed to present either direct or circumstantial evidence of discriminatory animus. Pet. App. 8a. Specifically, the court determined that evidence that the selection committee members were all African-Americans and that perhaps only one member evaluated Keys did not raise a genuine issue of material fact with respect to the University's motives. *Id.* At most, the court concluded, Shakir had only "imput[ed] a large amount of general unfairness" to the University. *Id.*, at 9a.

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2. *See* 5TH CIR. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).").

REASONS TO DENY THE PETITION

I. THE QUESTION REGARDING THE PROPER STANDARD FOR EVALUATING COMPARATIVE QUALIFICATIONS AS EVIDENCE OF PRETEXT IN TITLE VII CASES DOES NOT WARRANT REVIEW.

Shakir seeks review of the court of appeals's application of the "clearly better qualified" standard in evaluating his summary-judgment evidence of pretext because (1) there is a "stark" conflict among the circuits regarding the proper standard for evaluating comparative qualifications as pretext evidence, Pet. 6, 16; (2) the "clearly better qualified" standard conflicts with the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Pet. 13; and (3) the court of appeals's reference to the metaphor that any qualifications disparity must "jump off the page and slap us in the face" conflicts with the Court's decision in *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), Pet. 8. None of these arguments warrants certiorari review.

A. The Circuits Mostly Agree on the Standard for Evaluating Comparative Qualifications as Evidence of Pretext and Any Differences Exist More in Degree than in Kind.

In *Ash*, the Court reaffirmed that, in a Title VII case, "qualifications evidence may suffice, at least in some circumstances" to show that an employer's stated reason for failing to hire or promote the plaintiff was pretextual. 126 S. Ct., at 1197. And although the Court acknowledged that federal courts have "articulated various . . . standards" for evaluating whether such evidence is probative of pretext, it declined "to define more precisely what standard should govern pretext claims based on superior qualifications." *Id.*, at 1197-98.

Shakir incorrectly portrays the circuits' varying standards as a "stark" contrast between (1) a heightened standard—employed by the court of appeals below—in which the plaintiff must show that he was "clearly better qualified" than the person that the defendant hired or promoted; and (2) a purportedly lower "reasonableness" standard in which the plaintiff must present evidence that an "ordinary and reasonable employer" would have hired or promoted him instead. *See* Pet. 16-21. In fact, almost all circuits employ a two-pronged test: If a plaintiff relies *solely* on qualifications evidence to show pretext, then he must show some material disparity in those qualifications—*e.g.*, he was "clearly better qualified"; on the other hand, if a plaintiff relies on qualifications *and* other competent evidence of pretext, he need only show that he was better or comparably qualified. *See infra*, Part I.A.1. And those few circuits that have articulated another test employ standards that differ more in degree than in kind. *See id.* To the extent those differences matter, this case does not present a good vehicle to explore them because Shakir cannot show pretext under *any* standard. *See infra*, Part I.A.2.

1. The circuits have reached a near-consensus regarding the test for evaluating comparative qualifications as evidence of pretext.

The First, Second, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and District of Columbia Circuits apply the same two-pronged test for evaluating comparative qualifications as evidence of pretext in a Title VII failure-to-hire or failure-to-promote case. If the plaintiff's *sole* evidence of pretext is a comparison of his qualifications to those of the person hired or promoted, the plaintiff must show some material difference in those qualifications—*e.g.*, the plaintiff must be "obviously superior," "significantly better qualified," or "clearly better qualified." On the other hand, if the plaintiff presents comparative qualifications *and* other evidence of pretext—such as evidence that the employer falsified its stated

reason for failing to hire or promote the plaintiff—he need only show that he was merely "better than" or "equally qualified as" the person hired or promoted.[3]

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3. Specifically, these circuits have articulated this generally accepted two-pronged test as follows:

First Circuit: Comparative qualifications alone may be evidence of pretext if "the difference in qualifications is so stark as to support an inference of pretext" such that the plaintiff's qualifications are "obviously superior" to a successful applicant. *See Rathbun v. Autozone, Inc.*, 361 F.3d 62, 75 (CA1 2004) (citing *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 282 (CA5 1999)). But "a claimed difference in qualifications may be sufficient to ground an action if accompanied by independent evidence (say, evidence of pretext or discriminatory animus)." *Id.*

Second Circuit: "When a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications ignored by an employer . . . the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (CA2 2001) (quoting *Deines*, 164 F.3d at 280-81). In *Byrnie*, the court of appeals held that, while the plaintiff's qualifications evidence did not meet this standard, additional evidence showing the employer's explanation lacked credence allowed the plaintiff to survive summary judgment. *See id.*, at 103-04.

Fourth Circuit: "When a plaintiff asserts job qualifications that are similar or only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer. But where . . . the plaintiff has made a strong showing that his qualifications are demonstrably superior, he has provided sufficient evidence that the employer's explanation may be pretext for discrimination." *Heiko v. Colombo Sav. Bank*, 434 F.3d 249,

261-62 (CA4 2006). At the same time, "an equally valid way to prove pretext is to provide evidence that the employer's proffered reason was not the actual reason relied on, but was rather a false description of its reasoning—albeit one based on a real difference in qualifications—manufactured after the fact." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648 n.4 (CA4 2002).

Fifth Circuit: A plaintiff can demonstrate that an employer's asserted justification for its hiring decision was pretext by showing he was "clearly better qualified" for the position. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 882 (CA5 2003). But this standard applies only when the plaintiff "attempt[s] to prove pretext solely on the basis of her comparative qualifications." *See Rutherford v. Harris County*, 197 F.3d 173, 182 n.9 (CA5 1999); *see also Sanders v. Anadarko Petroleum Corp.*, 108 Fed. Appx. 139, 143 (CA5 2004) ("If, however, a plaintiff relies on comparative qualifications alone, she must present evidence that she is clearly better qualified than those individuals who were hired."). "A plaintiff may also establish pretext by presenting evidence that the employer's proffered explanation is false or unworthy of credence . . . ." *Sanders*, 108 Fed. Appx., at 143.

Sixth Circuit: "[E]vidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself, to raise a genuine issue of fact that the employer's proffered legitimate, non-discriminatory rationale was pretextual." *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627 (CA6 2006). That is, "to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former." *Id.* On the other hand, when "a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment." *Id.*, at 626-27.

Seventh Circuit: "[W]here an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext 'unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.'" *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (CA7 2002). In adopting this standard, the court of appeals distinguished cases in which "there was additional evidence of discrimination." *Id.*, at 1179.

Tenth Circuit: "[P]retext cannot be shown simply by identifying minor differences between plaintiff's qualifications and those of successful applicants. The disparity in qualifications must be 'overwhelming' to be evidence of pretext." *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1319 (CA10 1999) (internal citations omitted), *overruled on other grounds by AMTRAK v. Morgan*, 536 U.S. 101 (2002). However, "a plaintiff can show the proffered nondiscriminatory justification that the plaintiff was not the most qualified candidate is a pretext by . . . presenting evidence that he was comparably qualified accompanied by other evidence of discrimination." *Voltz v. Coca-Cola Enters.*, 91 Fed. Appx. 63, 73 (CA10 2004).

Eleventh Circuit: "[W]here an employee seeks to prove pretext through qualifications alone, the difference in qualifications must be so glaring that no reasonable impartial person could have chosen the candidate selected for the promotion in question over the plaintiff. However, where the qualifications disparity is not the *sole* basis for arguing pretext, the disparity need not be so dramatic to support an inference of pretext." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 772 (CA11 2005) (per curiam) (internal citations omitted).

D.C. Circuit: The court has explained that a plaintiff can establish pretext "[i]f a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job."

The sound rationale for this test is that courts and juries should generally defer to employers' business judgment regarding which applicant is best qualified for a position or promotion, unless (1) the disparity in qualifications is so great that even someone without business expertise would question whether the employer's decision was truthful or (2) there is evidence beyond comparative qualifications that tends to show the employer's qualifications-based reason is not credible. The Seventh Circuit aptly explained why a marked difference in qualifications is necessary to survive summary judgment if that is the only evidence of pretext:

> "If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department. Yet neither the judge nor the jury is 'as well suited by training and experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated.'" *Millbrook*, 280 F.3d, at 1181 (quoting *Odom v. Frank*, 3 F.3d 839, 847 (CA5 1993)).

Emphasizing the second prong of the test, the District of Columbia Circuit has recognized that, even when a plaintiff cannot show a qualifications disparity so great as to support an inference of pretext, there may be other evidence of "flaws in the employer's

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Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (CADC 1998). At the same time, "[a] plaintiff attacking a qualifications-based explanation is of course not limited to comparing his qualifications against those of the successful candidate." *Id.*, at 1295. If the plaintiff presents "adequate evidence" that "expose[s] other flaws in the employer's explanation," an inference of pretext may result. *Id.*

explanation." *Aka*, 156 F.3d, at 1295. "For example, the plaintiff can attempt to show that the employer's explanation was fabricated after the fact by showing that it contradicts other contemporaneous accounts of the employer's decision. Or a plaintiff can attempt to show that the employer's explanation misstates the candidates' qualifications." *Id.* The two-pronged test employed by most circuits accounts for both types of evidence without untenably placing courts in the role of a "'super personnel department' that second-guesses employers' business judgments." *Millbrook*, 280 F.3d, at 1181 (quoting *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (CA10 1999)).

The Ninth Circuit has articulated the same standard, holding that a plaintiff's "clearly superior" qualifications, standing alone, may be sufficient to show pretext. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (CA9 2003) (noting that evidence of a "pronounced difference" in qualifications raised a genuine issue of material fact as to pretext). But that court opined that its threshold for "clearly superior" qualifications was not as high as that of the Fifth and Tenth Circuits, which, prior to *Ash*, had employed the "jump off the page" metaphor to describe the requisite disparity. *Id.* Now that *Ash* has removed this distinction, it is more likely that the Ninth Circuit's "clearly superior" standard aligns with the Fifth Circuit's "clearly better qualified" standard and similar tests applied by most circuits when qualifications are the only evidence of pretext. And like those circuits, the Ninth Circuit also permits plaintiffs to show pretext through evidence beyond disparate qualifications. *Id.*, at 1194-95 (noting that "there are numerous other bases upon which a trier of fact could infer pretext").

The Third Circuit apparently has not developed distinct tests for evaluating pretext evidence based on qualifications alone and qualifications accompanied by other proof. Instead, that court has

developed a general test governing all types of evidence a plaintiff may marshal to demonstrate pretext:

> "[T]o survive summary judgment, [a plaintiff has] either (i) to present sufficient evidence to meaningfully throw into question, i.e., to cast substantial doubt upon, the [employer's] proffered reasons for not hiring him (e.g., by painting them as weak, implausible, contradictory, or incoherent), or (ii) to come forward with sufficient evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative cause of the adverse employment decision (e.g., by showing that the employer in the past had subjected him to unlawful discriminatory treatment, that the employer treated other, similarly situated persons not of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons)." *Fuentes v. Perskie*, 32 F.3d 759, 765 (CA3 1994) (citations omitted).

Though worded differently, this standard likely would yield the same results as the two-pronged test used by most circuits when applied to qualifications evidence. That is, the Third Circuit probably would not hold that slight differences in qualifications, standing alone, "cast substantial doubt upon" an employer's explanation that it hired the best qualified candidate. *See id.* Indeed, that court has held that disparities in two candidates' performance evaluations in some categories did not create a genuine issue of fact that the employer's selection of the lower-evaluated candidate based on his other managerial skills was pretextual. *Healy v. N.Y. Life Ins. Co.*, 860 F.2d 1209, 1217 (CA3 1988).

Finally, the Eighth Circuit has stated that a plaintiff may demonstrate pretext based on "an employer's selection of a less qualified candidate." *Kincaid v. City of Omaha*, 378 F.3d 799, 805

(CA8 2004). This "less qualified" standard superficially appears to be lower than most circuits' requirement of a material disparity in qualifications. At the same time, however, the Eighth Circuit has justified this standard in language almost identical to that used by other circuits to explain why a substantial difference in qualifications is required: "[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers." *Id.* (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (CA8 1995)); *cf. Byrnie*, 243 F.3d, at 106; *Bender*, 455 F.3d, at 627; *Millbrook*, 280 F.3d, at 1181. If the Eighth Circuit indeed defers to employers' business judgments and disclaims any role as a "super-personnel department," it seems doubtful that it would approve a showing of pretext based solely on a slight or unclear disparity in qualifications. Indeed, in at least one case, after reciting the "less qualified" standard, the Eighth Circuit ultimately rejected the plaintiffs qualifications-based pretext evidence because it failed to show that the person hired was "*substantially* less qualified." *Duffy v. Wolle*, 123 F.3d 1026, 1038 (CA8 1997) (emphasis added).[4]

In light of these precedents, Shakir widely misses the mark in his assessment of the circuits' standards. He claims "confusion" regarding whether circuits permit a plaintiff to demonstrate pretext using qualifications alone, Pet. 11, when, as shown, all circuits allow such a showing. He also erroneously claims that some circuits evaluate pretext evidence using a "reasonableness standard" that is a "modification of the business judgment rule." Pet. 16. To the contrary, these circuits use the business judgment rule to *justify* the material-disparity standard that Shakir challenges. For example,

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4. As with all other circuits, the Eighth Circuit also permits plaintiffs to show pretext with evidence other than comparative qualifications. *See Duffy*, 123 F.3d, at 1038-40.

the First Circuit has explained that "proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext"—a result that "follows from a form of the business judgment rule" because courts should defer to employers' personnel decisions in most cases. *Rathbun*, 361 F.3d, at 74. This deference yields only in "situations in which the difference in qualifications is so stark as to support an inference of pretext." *Id.*, at 75. Shakir's inaccurate analysis of circuit precedent directly informs his erroneous conclusion that these courts' standards for evaluating pretext evidence are in "stark conflict." Pet. 6.

In fact, any conflict among the circuits' standards in this area is, at best, extremely lopsided, with nine of twelve circuits employing the same two-pronged test to evaluate pretext evidence based on qualifications alone and qualifications plus other proof of falsity. The remaining three circuits' standards differ more in degree than in kind and, in most cases, it is unlikely that application of those circuits' standards would yield different outcomes. Accordingly, whatever slight and vague distinctions may exist between the Third, Eighth, and Ninth Circuits' tests and the majority rule, they do not present an "important" conflict that merits certiorari review. *See* SUP. CT. R. 10.

2. Shakir's case is a poor vehicle for resolving any differences among the circuits' standards.

Even if the Court were interested in addressing any differences in the circuits' standards for evaluating comparative qualifications as pretext evidence, Shakir's petition is a poor vehicle for doing so. Shakir cannot show that he would survive summary judgment under *any* circuit's standard.

The University's legitimate, non-discriminatory reason for hiring Keys instead of Shakir was that the three highest-ranked candidates were either no longer interested or unavailable, Keys was ranked fourth, and Shakir was ranked nineteenth. Pet. App. 3a,

12a; R.329. Shakir first attempted to show that this reason was pretextual based on arguments that the hiring process was skewed in favor of Keys. Pet. App. 5a. The court of appeals concluded, however, that these contentions either were not supported by the record or were immaterial to the University's proffered reason. *Id.*, at 5a-7a.

Shakir's only remaining summary-judgment evidence of pretext was his allegedly superior qualifications. Pet. App. 7a. The district court had thoroughly reviewed Shakir's and Keys's qualifications and determined that "[t]here are simply no glaring differences between the qualifications of the two men." Pet. App. 27a. Consequently, the district court had been "unable to conclude that [Shakir's] qualifications were superior to those of Dr. Keys, much less clearly superior." *Id.* The Fifth Circuit similarly held that Shakir's particular strengths did not render him more qualified than Keys in light of the wide-ranging applicant criteria listed in the Agronomist job posting. *Id.*, at 7a. Indeed, the evidence showed that Keys was a better fit for the position than Shakir in light of the former's field-research experience. *See id.*, at 3a, 15a. Shakir also never accounts for the fact that there were fourteen additional applicants ranked above him; they presumably would have been in line for the position ahead of Shakir had Keys not accepted. *See id.*, at 3a, 13a.

Given that Shakir failed to raise a fact issue as to whether he was even marginally better qualified than Keys, Shakir would not have defeated the University's summary-judgment motion in *any* circuit—even one that does not require a material disparity in qualifications evidence. For this reason, Shakir's petition would not be an effective vehicle for the Court to resolve any differences in the circuits' standards for evaluating comparative qualifications as proof of pretext.

B. When a Title VII Plaintiff's Sole Evidence of Pretext Is Comparative Qualifications, Requiring a Showing of Material Disparity in Those Qualifications To Defeat Summary Judgment Does Not Conflict with the Court's Decision in *Reeves*.

Shakir also incorrectly asserts that the court of appeals's application of the "clearly better qualified" standard conflicts with the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Pet. 13-16. That standard addresses a different stage of a Title VII plaintiff's proof than *Reeves*'s holding and does not conflict.

In *Reeves*, the Court addressed a circuit conflict regarding whether a plaintiff, having already survived summary judgment by establishing a prima facie case of discrimination and presenting sufficient evidence that the employer's proffered reason was pretextual, nevertheless had to introduce additional, independent evidence of discrimination to prevail on his claim. 530 U.S., at 140-41. The Court held that such additional evidence was not necessarily required because a jury could infer unlawful discrimination from a combination of the plaintiff's prima facie case and his pretext evidence. *Id.*, at 148-49.

Shakir contends that any requirement that a plaintiff show a material disparity in qualifications evidence at the summary-judgment stage to show pretext amounts to a demand for additional evidence of discrimination that is prohibited under *Reeves*. Not so. As discussed *supra*, when a plaintiff relies solely on qualifications evidence to show pretext, most circuits require a showing of substantial difference in qualifications because comparable or only slightly better qualifications are as likely to be probative of an ordinary business judgment as they would give rise to an inference of falsity. *See supra*, Part I.A.1. In other words, a mere showing that the plaintiff is better qualified is insufficient evidence of

pretext. *Reeves* does not come into play until the plaintiff has already shown sufficient evidence of pretext (and a prima facie case). 530 U.S., at 147-48. At *that* point, *Reeves* dictates that the plaintiff need not present more evidence of discrimination to prove liability. Thus, a "clearly better qualified" standard and *Reeves* address different aspects of a plaintiff's proof and do not conflict.

Shakir misplaces reliance on Judge Dennis's special concurrence in *Manning v. Chevron Chemical Co.*, 332 F.3d 874 (CA5 2003), as support for his argument that the "clearly better qualified" standard conflicts with *Reeves*. Pet. 13. Judge Dennis acknowledged that, if the "clearly better qualified" test were applied *only* as a standard for determining whether the plaintiff had presented sufficient evidence of pretext, such an application would accord with *Reeves*. *See* 332 F.3d, at 885 (Dennis, J., specially concurring). Judge Dennis expressed concern, however, that the Fifth Circuit had previously described the "clearly better qualified" test as a metric for proving the "ultimate fact" of discrimination—an application that would arguably contradict *Reeves*. *Id.* In this case, the court of appeals used the "clearly better qualified" test only to determine whether Shakir had presented sufficient evidence of pretext to survive summary judgment, Pet. App. 7a, which does not implicate Judge Dennis's concern about *Reeves*.

Shakir also misconstrues the Fourth Circuit's decision in *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639 (CA4 2002), as repudiating a heightened standard for pretext evidence in light of *Reeves*. Pet. 14-15. Prior to *Reeves*, the Fourth Circuit had held that a Title VII plaintiff must always show that he is better qualified than the person hired or promoted not merely to show pretext, but also ultimately to prove liability. *Evans v. Techs. App. & Serv. Co.*, 80 F.3d 954, 960 (CA4 1996). In *Dennis*, the Fourth Circuit recognized that this requirement conflicted with *Reeves* because a plaintiff could conceivably show pretext through non-qualifications evidence and that showing, combined with a prima

facie case, would support liability without any proof of superior qualifications. 290 F.3d, at 648 n.4. The Fourth Circuit recognized, however, that such a case would be distinguishable from situations where the plaintiff's *only* competent pretext evidence was comparative qualifications and a material disparity in those qualifications is required. *Id.*, at 648 (distinguishing *Deines*, 164 F.3d, at 280-81). Moreover, since the Court issued *Reeves*, the Fourth Circuit has continued to require a showing of "demonstrably superior" qualifications when that is the sole evidence of pretext. *Heiko,* 434 F.3d, at 261-62.

C. The Court of Appeals's Reference to the "Slap in the Face" Metaphor Disapproved in *Ash* Was at Most Harmless Error.

Shakir further argues that the Court should grant certiorari because the court of appeals's statement that any qualifications disparity should be so apparent as to "jump off the page and slap us in the face," Pet. App. 7a, conflicts with the Court's recent decision in *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006). Pet. 7-8. In light of *Ash*, the court of appeals did err in referring to this metaphor, but this error was harmless.

In *Ash*, the Court disapproved use of the "jump off the page" metaphor "as an *elaboration* of the standard for inferring pretext from superior qualifications." 126 S. Ct., at 1197 (emphasis added). But the Court expressly did not disapprove the standards themselves, citing as representative examples: (1) "disparities in qualifications must be of such weight and significance that no reasonable person . . . could have chosen the candidate selected over the plaintiff for the job in question"; (2) "qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are 'clearly superior' to those of the selected job applicant"; and (3) "the factfinder may infer pretext if 'a reasonable employer would have found the plaintiff to be significantly better

qualified for the job.'" *Id.*, at 1197-98 (citing, respectively, *Cooper v. Southern Co.*, 390 F.3d 695, 732 (CA11 2004); *Raad*, 323 F.3d, at 1194; *Aka*, 156 F.3d, at 1294). And since *Ash* was decided, several courts of appeals have affirmed that *Ash* did not disturb their requirements for showing a material disparity in qualifications evidence to demonstrate pretext. *See, e.g.*, *Kearney v. County of Rockland*, 185 Fed. Appx. 68, 69-70 (CA2 2006) (employing the requirement that plaintiff's qualifications must be "so superior" that "no reasonable person" could have chosen the candidate selected over the plaintiff); *Bender*, 455 F.3d, at 627 (commenting that Sixth Circuit's "significantly better qualified" test comports with standards cited in *Ash*); *Mlynczak v. Bodman*, 442 F.3d 1050, 1059-60 (CA7 2006) (concluding that "nothing in *Ash* . . . requires reconsideration of [our] approach to qualifications evidence"); *Ash v. Tyson Foods, Inc.*, No. 04-11695, 2006 WL 2219749, at *3 (CA11 Aug. 2, 2006) (confirming on remand that Eleventh Circuit's heightened standard for disparity in qualifications remains in effect).

Thus, notwithstanding the court of appeals's reference in a non-precedential opinion to the "jump off the page" metaphor, it correctly applied the Fifth Circuit's "clearly better qualified" standard for pretext evidence based solely on qualifications. Pet. App. 7a. As discussed *supra*, Shakir failed to show that he was merely better qualified than Keys, much less raise a fact issue as to whether he was "clearly better qualified." *See supra*, Part I.A.2. Consequently, any conflict with *Ash* was harmless error and does not warrant review.

II. THE COURT OF APPEALS'S MIXED-MOTIVE ANALYSIS DOES NOT CONFLICT WITH THE COURT'S DECISION IN *DESERT PALACE*.

In addition to his arguments regarding the assessment of his pretext evidence, Shakir also complains that the court of appeals's

mixed-motive analysis conflicts with the Court's decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003). Pet. 21-28. In fact, Shakir misreads the court of appeals's opinion and no conflict exists on this issue.

Under the 1991 amendments to Title VII, a plaintiff may establish liability if he can show that unlawful discrimination was a motivating factor for the challenged employment decision even if the employer was also motivated by other factors. 42 U.S.C. §2000e-2(m). As an affirmative defense to damages for such liability, an employer may show that it would have taken the same action in the absence of the impermissible motivating factor. *Id.*, §2000e-5(g)(2)(B). In *Desert Palace*, the Court simply clarified that a plaintiff can invoke the mixed-motive analysis by presenting sufficient *direct or circumstantial* evidence of a discriminatory motive. 539 U.S., at 98-102.

Shakir contends that the court of appeals's decision conflicts with *Desert Palace* based on language in a footnote in the opinion: "The mixed-motive theory 'comes into play where direct evidence of discrimination is presented, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination.'" Pet. App. 10a n.2 (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309 (CA5 2004)). Shakir incorrectly reads this statement to mean that the court of appeals permits a plaintiff to proceed on a mixed-motive theory *only* when he proffers direct evidence of discrimination. *See* Pet. 21-22 & n.12. Any such inference is plainly rebutted by the court's recitation of the correct standard in the body of its opinion: "A plaintiff may plead the mixed-motive alternative using *either direct or circumstantial evidence* of animus." Pet. App. 8a (citing *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (CA5 2005)) (emphasis added). The court correctly concluded that Shakir's evidence—the racial composition of the selection committee and the existence of one scoring sheet for Keys—was insufficient direct

or circumstantial evidence of intentional racial discrimination to survive summary judgment. *Id.*, at 8a-9a. This case presents no conflict with *Desert Palace*.

Shakir also raises questions about the continued applicability of the *McDonnell Douglas* burden-shifting framework in Title VII cases after *Desert Palace*. Pet. 22-25. But as Shakir concedes, there is no circuit conflict on this question. Pet. 22. Moreover, Shakir acknowledges that the Court has reaffirmed the *McDonnell Douglas* framework since it issued its decision in *Desert Palace*. *Id.* (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003)). In the absence of any conflict among the courts of appeals or the relevant decisions of this Court, this issue does not warrant review. *See* SUP. CT. R. 10.

III. SHAKIR'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY-JUDGMENT STANDARD DOES NOT WARRANT REVIEW.

Finally, Shakir asserts that the court of appeals departed from the accepted and usual course of judicial proceedings by failing to consider certain evidence, failing to construe evidence in Shakir's favor, and making credibility determinations. Pet. 28-29. In other words, Shakir claims that the court misapplied the summary-judgment standard under Federal Rule of Civil Procedure 56. *See* FED. R. CIV. P. 56(c). But Shakir's arguments amount to nothing more than subjective disputes regarding the significance of his qualifications relative to other applicants, the ranking of certain applicants, and the probative value of minutiae such as an arrow drawn next to Shakir's name on a scoring sheet. *See* Pet. 24-25 n.13. Addressing these arguments would mire the Court in a detailed record and numerous questions about the appropriate weighing of the twenty-six applicants' qualifications. This fact-bound inquiry does not warrant certiorari review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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